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In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

vs.

O. E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF RESPONDENT

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No. 622

WILLIAM L. MAXWELL,
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O. E. BISHOP, Superintendent of Arkansas State Penitentiary,
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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The interest of the People of the State of California is limited to the first question set forth in the order granting writ of certiorari, which reads as follows:

> "1. Whether Arkansas' practice of permitting the trial jury absolute discretion, uncontrolled by standards or directions of any kind, to impose the death penalty violates the Due Process Clause of the Fourteenth Amendment?"

Amicus curiae has no interest in the disposition of the second question relating to the constitutionality of the procedure whereby issues of guilt and penalty are determined at a single hearing and upon a single verdict. California does not employ this procedure, but rather utilizes a two-stage trial with the issues of guilt and penualty being determined in separate proceedings. Cal. Pen. Code § 190.1.

We do, however, have a substantial interest in the first question. California, like Arkansas, gives no standards to juries to bind them in the determination of whether to impose the sentence of death or life imprisonment upon a defendant convicted of first-degree murder. But California does have certain important safeguards against arbitrariness in the sentencing process which may or may not be present in Arkansas. Furthermore, petitioner has vigorously alleged the existence of racial discrimination in the capital sentencing process of Arkansas, and has used this as a demonstration of alleged abuse of this sentencing process attributable in part to the lack of standards binding the jury. Whether or not this claim is valid, no possible claim of racial discrimination in capital sentencing in California has been or could be made. We fully support respondent in regard to the general proposition that a legislative scheme of capital sentencing which refuses to impose strictures upon the discretion of the sentencer, be it judge or jury, denies no constitutional right whatever.

The sole common feature of the California and Arkansas procedures is the absence of standards re-

stricting the discretion of a jury in a capital case in determining whether to spare the life of the defendant. We believe that a sentencing procedure without such standards is constitutional and is in fact an ameliorative procedure which has the effect of minimizing the number of death sentence verdicts actually returned.

It is the desire to uphold the validity of our California practice that brings The People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

In asking this Court to strike down as unconstitutional any procedure for capital sentencing which does not provide standards to minimize the discretion of jurors or judges in performing their sentencing function, petitioner makes a complex, highly theoretical argument, which entirely ignores the practical consequences that should be uppermost in the mind of this Court in determining whether due process and equal protection require the limitation of discretion in the capital sentencing procedure. His argument has never been accepted by any court.

Our basic proposition is a simple one: penalty trials conducted without standards deny neither due process nor equal protection and as a practical matter result in far fewer death sentences than would trials conducted with any reasonable set of standards. Death is the *de jure* or *de facto* presumptive penalty for first

degree murder and other capital offenses. The effect of the standardless penalty trial is to give the jury (and in California, the judge as well) free rein to grant mercy. The imposition of fixed and limited standards would tend to stifle the impulse to dispense mercy by at once diminishing each juror's individual responsibility to make a choice between life or death according to his conscience, and by forcing him to justify, to himself and his fellow jurors, upon some unknown grounds, his compassionate inclination to spare life.

This case comes up from a jurisdiction which employs an unusual sentencing procedure. In Arkansas, if petitioner is correct in his reading of the law of that state, a jury and only a jury makes this sole, unreviewable judicial decision between life and death in a capital case. It is thus claimed that the standardless penalty trial invites the jury to act arbitrarily, that the single-verdict procedure deprives the jury of factual information it needs to act rationally, and that the absence of judicial review or even meaningful judicial participation in the sentencing process provides no safeguard against arbitrariness. Without conceding the validity of any of these arguments, we wish to note that the California procedure is radically different and clearly distinguishable. In California, a penalty jury may be waived. The trial judge has the duty to review any death sentence recommended by a jury and to pass such a sentence only if, in his independent judgment, it is justified. Furthermore, the California Supreme Court, while lacking the formal power to reduce a death sentence, retains a very large measure

of control over the sentencing process by means of its power to reverse, solely as to punishment, judgments of death on the basis of errors that would be insignificant in the guilt phase. Furthermore, California employs a two-stage trial which, though we do not in any way concede is constitutionally required, does ensure that all evidence relevant to punishment (except that which the California Supreme Court has held the People may not present) is presented to the jury, and at no cost to the defendant's privilege against self-incrimination.

We will leave to respondent the task of rebutting any inference of racial discrimination in the imposition of the death sentence for rape in Arkansas which may arise from the statistics gathered by petitioners, but we submit that if such discrimination is proved, no connection has been established between it and the lack of standards in capital sentencing. It seems most unlikely that juries determined to discriminate on racial grounds will be deterred by any abstract standards which the judge may give them.

PRELIMINARY STATEMENT

Before proceeding to our argument, we feel obliged to call to the attention of the Court that there is reasonable ground to believe that no case or controversy actually exists in this matter. The only issues embraced by the grant of certiorari in this case (see Appendix, p. 76) concern the validity of petitioner's death sentence, and not the validity of his conviction. If he is

entitled to have his death sentence set aside upon other grounds, he would appear to have no business asserting before this Court the contentions which he has made.

Since the jury in petitioner's case imposed the death sentence upon him on June [illegible] before the decision of this Court in *Witherspoon v. Illinois*, 391 U. S. 510 (1968), there is a substantial possibility, and perhaps a probability, that the jury which imposed the death sentence was constituted in violation of the principles laid down in that case, which are fully retroactive. If such is the case, petitioner would be entitled to have his death sentence set aside, on *Witherspoon* grounds, upon application to any court of competent jurisdiction. In their documents before this Court, petitioner's counsel have not even alluded to the possibility of *Witherspoon* error.

Petitioner's silence on this point is understandable. By securing the *Witherspoon* issue in any collateral proceeding, he would obtain a "free ride" on the instant case. Since it is here in this Court, he would still be entitled to relief under *Witherspoon*. In the view here, his counsel will have obtained a ruling of great value to them in their unfortunate judicial attack upon the death penalty.

Under the circumstances, we suggest that the question of whether *Witherspoon* error is present in the record of petitioner's trial is a proper subject of inquiry by the Court in the instant case. We therefore have access to the trial transcript and we note that the two jurors who voiced the possibility of *Witherspoon* error that

ARGUMENT

I

A LEGISLATIVE OMISSION NOT TO REJECT BY THE IMPOSITION OF STANDARDS THE POWER OF JURIES TO SPARE THE LIVES OF PERSONS CONVICTED OF CAPITAL CRIMES DENIES NEITHER DUE PROCESS NOR EQUAL PROTECTION

> "The discretion conferred upon the penalty jury is similar to that conferred upon the trial court to punish certain crimes as either felonies or misdemeanors. Many sections of the Penal Code vest in the trial court discretion to sentence defendants convicted of crimes to state prison or to jail without mention of standards for the exercise of that discretion. [Citation] Such sections have been held not to violate due process or equal protection." *Id.* at 651, 447 P.2d at 126, 73 Cal. Rptr. at 30.

Indeed, the broadening of discretion in the matter of sentencing has been noted as one of the progressive developments in the criminal law in the past half century. Thus, provisions for indeterminate prison sentences, the power of a trial court to reduce a felony offense to a misdemeanor, and to grant probation in an expanded number of cases, have appeared along with the substitution of an unlimited power of a jury to grant a life sentence in a capital case for the prior practice of an automatic death sentence upon the return of a verdict of guilty. Moreover, the broadening of sentencing discretion generally and in capital cases particularly has accompanied and in no way has been inconsistent with the broadening of constitutional protections for criminal defendants. We submit that the argument advanced by petitioner's counsel exalts theory over practicality, and ignores history.

This Court has never shut its eyes to the practical consequences of its far-reaching decisions. Notably, this Court has shaped its retroactivity doctrines with an eye to minimizing the negative practical conse-

quences to the state of applying retrospectively a newly announced doctrine. See *Stovall v. Denno*, 388 U.S. 293 (1967); *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Tehan v. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). When this Court considers adoption of a new constitutional ruling which deals exclusively with matters of life and death, the probable practical results of the doctrine must be examined with the greatest care.

In support of the argument that standardless trials work in favor of the defendant, we begin with the proposition that death is the presumptive penalty for capital offenses, usually murder in those English speaking jurisdictions which retain capital punishment. It is not the preferred penalty in the sense of being more frequently imposed than life imprisonment, for petitioner correctly notes that it is everywhere imposed in only a minority of capital cases. It is, however, the presumptive penalty, in law, in fact, or in both. In some states the Legislature has expressed a preference for the death penalty over its alternative of life imprisonment. In others, such as California, the Legislature has remained neutral as between the two alternatives. See Cal. Pen. Code § 190.1. But to hold that a standardless proceeding is constitutional in the former jurisdictions but not in the latter would be to exalt form over substance. *In re Anderson, supra*, 69 A.C. 638, 650, 447 P.2d 117, 125, 73 Cal.Rptr. 21, 29 (1968). But whatever the legislative prescription, it is undeniable that in the minds and hearts of the lay juryman, death is the presumptive

penalty for murder. In our cultural heritage, from the Old Testament, through the English common law, modern crime fiction and motion pictures, through the daily news media reports of "A Man on Trial for His Life," the penalty for murder is death. The principle that wilful and deliberate killing is followed by the noose is inextricably a part of our collective consciousness. The juror thus brings with him to the jury box the expectation that death will ordinarily follow upon a finding of guilty.

Why, then, is the death sentence imposed with comparative rarity? The answer is that no jury lightly assumes the responsibility of ordering a man's death. The question confronting a jury which has found an accused guilty of a capital crime is therefore not, "Shall we kill him?" but "Shall we spare him?" Legislation which omits standards for the jury's determination amounts to an affirmation that the jury should be in no way impeded in answering that question in the affirmative.

In voting to spare the life of a defendant convicted of a capital crime, the jury is acting upon its feelings of charity, benevolence, sympathy, pity, empathy, and humanity. See A. Koestler, *Reflections on Hanging*, 166-167 (1956). These emotions are highly valued in every civilized culture, but they are, in the best sense of the word, non-rational. This Court has put the matter somewhat differently, but quite aptly:

> "The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of

> opinion that they are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of the opinion that it would not be wise or just to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone." *Winston v. United States*, 172 U.S. 303, 312-313 (1899).

That any reasonable system of standards would indeed result in more death sentences than the current standardless procedure is a proposition which, though of necessity in part theoretical, can hardly be doubted. The only conceivable type of standards which legislatures could enact would necessarily revolve around aggravating and mitigating circumstances. The legislature might simply identify and enumerate such circumstances, provide for their being read to the jury, and leave the matter in the jury's sole discretion. It would, of course, be totally illogical for this Court to impose on the states, as a matter of constitutional law, the requirement that juries be instructed in terms of standards which they would be entirely free to disregard.

In any event such a formulation of standards, being essentially advisory, could be of no substantial benefit to convicted defendants. The jury would remain totally free to disregard the list of aggravating and mitigating circumstances. And the amount of harm to a defendant that such a formulation of standards could work is enormous. Indeed, the very enumeration of aggravating and mitigating circumstances would tend strongly to impel the jury to impose the death sentence wherever the case showed one or more aggravating circumstances and no mitigating circumstances. The jury's natural predisposition to spare life can be diminished by pointing to a set of prescribed standards for leniency and citing the defendant's failure to meet those standards as justification for refusing to spare him.

The second major type of standards that could be derived would similarly enumerate aggravating and mitigating circumstances but would require that one or more of the aggravating circumstances and none or fewer than all of the mitigating circumstances be present in order to justify imposition of the death penalty. We would insist that the question of what crimes warrant the death penalty is essentially a decision for the elected representatives of the people. See concurring opinion of Mosk, J., in *In re Anderson*, *supra*, 69 Ac ctis; ons, 447 P.2d 117, 131-132, 74 Cal.Rptr. 21, 35-36. Moreover, this Court should properly, at least in this case, require legislatures to enact such "binding" standards. Such standards would effectively narrow the range of crime for which the

death penalty may be imposed. This Court could not hold that such narrowing must take place unless it first held that the death penalty could not be constitutionally imposed for any certain capital offense. That question is, of course, not before this Court in this case, and we submit that it has no place in the instant proceeding.

Indeed, counsel have not suggested any specific limiting principles that would give rise to binding standards. The only set of standards ever formally devised, to our knowledge, is found in Model Code § 210.6 (Proposed Official Draft 1962). This section enumerates certain aggravating and mitigating circumstances and provides that a death sentence may be imposed only if one of the aggravating circumstances is found and there are no mitigating circumstances sufficiently substantial to call for leniency. These aggravating circumstances are:

> "(a) The murder was committed by a convict under sentence of imprisonment.
>
> "(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
>
> "(c) At the time the murder was committed the defendant also committed another murder.
>
> "(d) The defendant knowingly created a great risk of death to many persons.
>
> "(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by

force or threat of force, arson, burglary or kidnaping.

"(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

"(g) The murder was committed for pecuniary gain.

"(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity."

The foregoing list of aggravating circumstances is difficult to quarrel with, and would probably command a rough consensus among those who favor the death penalty as to what may properly be considered aggravating. It is worth noting that in each of the last twenty-two cases reviewed by the California Supreme Court (which reviews all death sentences imposed in California) in which a sentence of death was imposed for first-degree murder, one or more of the aggravating circumstances enumerated in the Model Penal Code were present.[1] We have no way of knowing, of

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[1] *People v. Durham*, 70 A.C. 179, ___ P.2d ___, ___ Cal.Rptr. ___ (1969) (forcible resistance to arrest); *People v. Anderson*, 70 A.C. 58, 447 P.2d 956, 73 Cal.Rptr. 550 (1968) (exceptional heinousness and depravity—60 stab wounds in body of victim, a ten-year-old girl); *People v. Beivelman*, 70 A.C. 37, 447 P.2d 913, 73 Cal.Rptr. 521 (1968) (robbery); *People v. Risenhoover*, 70 A.C. 15, 447 P.2d 925, 73 Cal.Rptr. 533 (1968) (kidnaping); *People v. White*, 69 A.C. 781, 446 P.2d 993, 72 Cal.Rptr. 873 (1968) (burglary, robbery, and rape); *People v. McDowell*, 69 A.C. 766, 447 P.2d 97, 73 Cal.Rptr. 1 (1968) (robbery); *People v. Bassett*, 69 A.C. 121, 443 P.2d 777, 70 Cal.Rptr. 193 (1968) (double murder); *People v. Lara*, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal.Rptr. 586 (1967) (kidnaping); *People v. Jackson*, 67 Cal.2d 96, 429 P.2d 600, 60 Cal.Rptr. 248 (1967) facts reported at 59 Cal.2d 375, 379 P.2d 937, 29 Cal.Rptr. 505 (1963) (rape; prior convictions of crimes of violence); *People*

course, in how many cases the jury, notwithstanding the presence of aggravating circumstances, spared the defendant's life for no reason other than the desire to dispense mercy.

An additional problem with any attempt to formulate standards is that any list of mitigating circumstances must necessarily be exclusive; it cannot hope to foresee and provide for all the possible mitigating circumstances that could arise in the context of a given case. Under the present standardless system, the defendant's attorney is able to seize upon any circumstance and argue that it is mitigating, without being forced to attempt to bring himself within a prescribed list.

It is worth noting that in California the standardless penalty trial has evolved through a series of court decisions all of which, at the insistence of defendants

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v. Powell, 67 Cal.2d 32, 429 P.2d 137, 59 Cal.Rptr. 817 (1967) (kidnaping); *People v. Massie*, 66 Cal.2d 899, 428 P.2d 869, 59 Cal.Rptr. 733 (1967) (robbery); *People v. Varnum*, 66 Cal.2d 808, 427 P.2d 772, 59 Cal.Rptr. 108 (1967) (robbery, kidnaping); *People v. Wilson*, 66 Cal.2d 749, 427 P.2d 820, 59 Cal.Rptr. 156 (1967) (double murder, possibly in the course of perpetrating a burglary); *People v. Modesto*, 66 Cal.2d 695, 427 P.2d 788, 59 Cal. Rptr. 124 (1967) (double murder, possibly in the course of perpetrating rape and burglary; prior murder conviction); *People v. Hill*, 66 Cal.2d 536, 426 P.2d 908, 58 Cal.Rptr. 340 (1967) (robbery); *People v. Pennington*, 66 Cal.2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967) (kidnaping, rape, as indicated at 66 Cal.2d 511 n. 1); *People v. Bandhauer*, 66 Cal.2d 524, 426 P.2d 900, 58 Cal. Rptr. 332 (1967) (robbery); *People v. Gonzales*, 66 Cal.2d 482, 426 P.2d 929, 58 Cal.Rptr. 361 (1967) (robbery); *People v. Griffin*, 66 Cal.2d 459, 426 P.2d 507, 58 Cal.Rptr. 107 (1967) (rape); *People v. Hines*, 66 Cal.2d 348, 425 P.2d 557, 57 Cal.Rptr. 757 (1967) (robbery); *People v. Lookadoo*, 66 Cal.2d 307, 425 P.2d 208, 57 Cal.Rptr. 608 (1967) (robbery); *People v. Spencer*, 66 Cal.2d 158, 424 P.2d 715, 57 Cal.Rptr. 163 (1967) (robbery, kidnaping).

and for their benefit, removed from the jury's consideration standards found inimical to defendant's interest. *People v. Green*, 47 Cal. 209, 302 P.2d 307 (1956), overruled the line of cases upholding the propriety of instructing the jury that it should bring in the death penalty unless it found mitigating circumstances. In *People v. Love*, 56 Cal.2d 720, 366 P.2d 33, 809 (1961), prosecutors were forbidden to argue to the jury that the death penalty is a deterrent to crime. *People v. Morse*, 60 Cal.2d 631, 388 P.2d 33, 36 Cal.Rptr. 201 (1964), held that neither by instruction nor evidence could the jury be informed that a person convicted of first degree murder and sentenced to life imprisonment could be paroled within seven years. The experience of the California courts thus tends strongly to bear out the proposition that standards can only result in more death sentences.

The argument for the constitutionality of standardless penalty trial has gained strength from the decision of this Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), where this Court narrowed the grounds for exclusion of potential jurors in capital cases in the interest of making the jury as representative as possible of the conscience and values of the community by ensuring that people opposed to the death penalty will not be excluded from juries unless their bias is so pervasive as utterly to preclude their voting for the death penalty. The Court has declared that "a jury that must choose between life imprisonment and capital punishment can do little more *and must do nothing less* than express the conscience of the community on the question of life or death." *Id.* at

519. (Emphasis added.) The grant of discretion to a sentencing jury gives the conscience of the community the fullest application in any given case. Thus in arguing against full discretion, petitioner's counsel are in reality stating that the conscience of the community should not be brought fully to bear on the question of sentence. If a penalty jury were required to apply prescribed standards, then by the authority of *Witherspoon* each side would be able to exclude for cause those jurors who, though they would not automatically vote against a death sentence, stated that they were in disagreement with the standards and would refuse to apply them. The resulting jury would thereby be less representative of the community than was envisioned by the *Witherspoon* decision.

Petitioner asserts that the standardless penalty proceeding denies regularity and equality. This is not correct. As was stated in *In re Anderson*, *supra*, 69 A.C. 638, 651, 447 P.2d 117, 127-128, 73 Cal.Rptr. 21, 31-32, equal protection is afforded because every person has the same chance for lenience as well as the same possibility of receiving the maximum penalty. Thus there is nothing discriminatory in the procedure.

Petitioner in effect demands that all capital defendants be equally deprived of the beneficent effects of a jury's unrestrained pity, sympathy, and other merciful inclinations. The principle of equality in capital sentencing may be intellectually satisfying, but we cannot believe that the Constitution requires jurisdictions retaining capital punishment to return to a sen-

> and state legislatures from effectuating a substantive end not constitutionally denied them, by whatever permissible means those bodies consider most appropriate." Note, 109 U. Pa. L. Rev. 67, 89 (1960).

In this case, the national and state legislatures have desired to effectuate the substantive end of minimizing the actual incidence of the death penalty through allowing juries free rein to exercise mercy rather than to adhere to the demands of strict justice. It is inconceivable that this end would be constitutionally denied the legislatures, and for that reason, the standardless penalty trial is immune from the vagueness attack.

In addition, a ready answer has been provided to petitioner's contention that the *ad hoc* judgments necessarily made by juries in capital sentencing are *per se* unconstitutional:

> "[I]nto the process of weighing . . . considerations [bearing upon vagueness] there enters that principle which is always a force in the Court's deliberations, precisely because the Court is charged with the preservation, in balance, of a complex lot of social and individual values: the principle of necessity. The maintenance of order is the precondition of any freedom in a society, and where the subject matter of regulation is such as to make unfeasible modes of law administration other than those which involve *ad hoc* judgments, considerable pressures are created in favor of permitting an *ad hoc* judgment scheme." *Id.* at 95.

Furthermore the sentencing function is no less particularized, *i.e.*, *ad hoc*, when carried out by a judge

in any criminal case. Both jury sentencing in a capital case and sentencing by a judge are similar in that the Legislature has prescribed the punishments available; in both it has authorized a specified body to make a choice within legally prescribed limits. A defendant's potential for rehabilitation is only one of a number of factors that a judge considers in determining what sentence to impose. He must also consider the community's needs for protection. No specific standard controls the exercise of a trial judge's discretion and no court has ever intimated, let alone held, that the defendant's rights are thereby violated. *In re Anderson*, 69 A.C. 638, 652, 447 P.2d 117, 126-127, 73 Cal.Rptr. 21, 30-31.

In concluding this argument, we direct the attention of the Court to the conclusions of the body which has made the most authoritative and exhaustive study to date of capital punishment:

> "There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics of the offense, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion." Royal Commission on Capital Punishment, 1949-1959 Report 173.

II

IF THIS COURT SHOULD FIND THE STANDARDLESS PENALTY TRIAL UNCONSTITUTIONAL IN THE CONTEXT OF THE ARKANSAS PRACTICE, DISTINGUISHING FEATURES OF CALIFORNIA PROCEDURE WOULD WARRANT REFUSAL TO STRIKE DOWN THE CALIFORNIA PRACTICE

Not contenting himself with an attack on the standardless penalty determination *per se*, petitioner has made much of certain aspects of Arkansas procedure and practice which are alleged to render the standardless penalty determination unconstitutional as practiced in Arkansas. We disagree with this contention, but believe it proper to leave to respondent the task of answering it. For our part, we will content ourselves with pointing out that these peculiarities of Arkansas practice do not exist in California and for that matter, are probably not general throughout the nation. We suggest that the finding of unconstitutionalities of the Arkansas practice would not justify a similar finding as to the standardless penalty proceeding *per se*.

Petitioner alleges that in Arkansas only a jury may determine whether a person convicted of a capital crime is to suffer the death penalty, and that a jury verdict of death is totally immune from any form of judicial review. In California, by contrast, a jury trial on the issue of penalty may be waived (Cal. Pen. Code § 190.4). In any event, judicial review of a jury's death verdict is readily available.

> "In disposing of a defendant's motion for a new trial, the trial judge has the duty to review the evidence to determine whether in his independent

> judgment the weight of the evidence supports the jury's verdict, and if he decides it does not, he has the power to reduce the penalty to life imprisonment." *In re Anderson*, 69 A.C. 613, 618, 447 P.2d 117, 121, 73 Cal.Rptr. 21, 28 (1968).

This power of judicial review acts as an obvious shield against arbitrary jury action.

While the Supreme Court has no power as such to reduce the death sentence, *ibid.*, it retains a large measure of control over such sentences. On the one hand, the California Supreme Court reverses numerous death judgments only as to penalty by viewing as inherently prejudicial almost any error in the penalty phase of a trial, see *People v. Hines*, 61 Cal.2d 164, 390 P.2d 398, 37 Cal.Rptr. 622 (1964), while applying to the guilt phase the same standard of harmless error which applies in trials generally.

In addition to making a separate argument for the unconstitutionality of the "single verdict" procedure, petitioner states that, when combined with the standard penalty trial, it has the effect of virtually compelling the jury to act irrationally in its penalty determination, for want of relevant factual information concerning the defendant which he cannot present during a single guilt-penalty trial without sacrificing his privilege against self-incrimination. While we do not accept this argument, we note that California is one of the five states which employs a bifurcated trial, with guilt and penalty being determined in separate proceedings. At these proceedings evidence of the circumstances surrounding the crime, the defendant's



capital sentencing that may arise from the factual data compiled by petitioner. We do, however, make the observation that petitioner has succeeded in establishing no nexus whatsoever between the claimed racial discrimination and the lack of standards characterizing the procedure for determining penalty in capital cases. If Arkansas jurors are, as petitioner has suggested, bent on racial discrimination, there is no reason whatever to believe that they will be deterred in carrying out such discrimination by any instruction or combination of instructions which a judge may read to them.

But if it be assumed that petitioner has established such a nexus between the alleged racial discrimination and the standardless penalty trial as to show that the latter causes, contributes to, or in any way exacerbates the former, the answer is to confine the remedy to the particular problem. We believe we have demonstrated the overall ameliorative effects of a standardless penalty proceeding. Given these effects, the standardless proceeding should be retained insofar as possible, and abandoned only to the extent necessary to cure the possible substantive evil of racial discrimination. Perhaps the answer, then, is to require standards (and perhaps bifurcated trials as well) only in rape trials, where rape is capitally punishable. The restriction of a constitutional requirement of legislatively imposed standards for the guidance of juries in penalty determinations to rape trials would, if petitioner's hypothesis about the nexus between racial discrimination and standardless penalty trials is true,

have the effect of surgically going to the root of racial discrimination in capital sentencing without employing the meat-axe procedure of requiring standards in all death penalty determinations or of unwarrantedly denying the general power of states to impose capital punishment for rape.

CONCLUSION

This Court should uphold the sound practice of allowing juries in capital cases free rein to exercise their natural inclinations to spare the defendant, without imposing on them standards which would inevitably have the effect of inclining the jury toward imposing strict justice rather than granting mercy. In any event, this Court should make no broad holding that standardless penalty trials are unconstitutional, regardless of local variations and procedures which effectively guard against arbitrary jury action.

Dated, San Francisco, California,
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Respectfully submitted,

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